APPEAL NO. 042226
FILED OCTOBER 26, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 5, 2004. The hearing officer determined that the respondent's (claimant) compensable injury of _____, does extend to and include the diagnosed condition of disc desiccation at the L5-S1 level of the claimant's lumbar spine after (date of alleged intervening injury). The hearing officer further determined that the compensable injury of _____, does not extend to or include the diagnosed condition of myofacitis of the lumbar spine after (date of alleged intervening injury). The appellant (carrier) appealed the determination regarding the disc desiccation. The appeal file does not contain a response from the claimant. The hearing officer's determination regarding the myofacitis has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The main thrust of the carrier's position at the CCH, and again on appeal, is that the claimant's current low back condition is due to an intervening injury which is alleged to have occurred on (date of alleged intervening injury). In other words, the carrier appears to be making a "sole cause" argument. In its appeal, the carrier states that "At the time the [c]laimant saw [Dr. R] on (date of alleged intervening injury), the [c]laimant had not needed actual medical treatment since November 26, 2002 (a period of approximately 15 months)." This is a misstatement of the evidence presented at the CCH. The first page of Claimant's Exhibit No. 7 is a medical record from Dr. R dated January 2, 2004, and that report indicates that the claimant came in that day for evaluation and treatment of his chronic, intractable lumbar pain related to his _____, compensable injury.

A careful review of the medical records in this case reveals that the underlying compensable injury is disc desiccation at the L5-S1 level. Additionally, the claimant offered testimony as to the relatively static nature of his condition and pain levels since he underwent an Intra Discal Electro Thermal procedure on July 19, 2000. Little to no evidence was put on by the carrier regarding the lifting incident which occurred on (date of alleged intervening injury), and to the extent the carrier was making a "sole cause" argument, they had the burden of proving that a new injury had occurred.

Extent of injury is a question of fact. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666

S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer was persuaded by the evidence presented by the claimant that the compensable injury includes disc desiccation at the L5-S1 level after (date of alleged intervening injury). In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO F. MALO**
**ZURICH NORTH AMERICA**
**12222 MERIT DRIVE, SUITE 700**
**DALLAS, TEXAS 75251**.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Edward Vilano
Appeals Judge